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No. 92-591

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA,
Petitioner,

v.

JOHN M. POINDEXTER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

KEITH A. JONES
Counsel of Record
RICHARD W. BECKLER
JOSEPH T. SMALL, JR.
STEPHEN M. MCNABB
FREDERICK ROBINSON
MICHAEL G. MCGOVERN
FULBRIGHT & JAWORSKI
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200
Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether the Independent Counsel proved that Admiral Poindexter's compelled immunized testimony was not used against him at trial.

2. Whether 18 U.S.C. § 1505 proscribes the making of misleading statements to Congress with constitutionally sufficient clarity or, indeed, at all.

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STATEMENT

1. *Background.* Respondent John M. Poindexter served as an officer in the United States Navy for almost thirty years. He graduated first in his class from the United States Naval Academy in 1958, earned a Ph.D. in nuclear physics at the California Institute of Technology in 1964, and by 1980 had risen to the rank of Rear Admiral. In June 1981 Admiral Poindexter was assigned to a position on the staff of the National Security Council ("NSC"). He was appointed Assistant to the President for National Security Affairs ("National Security Advisor") in December 1985. As National Security Advisor, he was responsible for advising the President on national security matters and overseeing the implementation of national security policy. *See* Joint Hearings before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Testimony of John M. Poindexter*, 100th Cong., 1st Sess., pp. 11-13 (1987) (*"Poindexter Testimony"*). This case arises out of two covert national security operations that began when Admiral Poindexter was on the NSC staff and continued after he became National Security Advisor: (1) covert sales of military equipment to Iran, made in an effort to establish better relations with that country and to obtain its assistance in securing the release of American hostages held in Lebanon; and (2) covert assistance to the rebel forces known as Contras who were opposing the Sandinista regime in Nicaragua.

2. *Assistance to the Contras.* In October 1984 Congress enacted the so-called Boland Amendment barring any governmental agency "involved in intelligence activities" from using appropriated funds to support military operations in Nicaragua. Continuing Appropriations, 1985—Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1935 (1984). This strict limitation was partially relaxed in December 1985. *See* Intelligence Authorization Act For Fiscal Year

1986, Pub. L. No. 99-169, § 105, 99 Stat. 1003 (1985); Further Continuing Appropriations, 1985, Pub. L. No. 99-190, § 8050, 99 Stat. 1211 (1985). The Boland Amendment did not define "intelligence activities," but that term was defined by Executive Order No. 12,333, 3 C.F.R. 200 (1981), in a manner that included the activities of the Central Intelligence Agency ("CIA") and several other agencies but excluded, by implication, the activities of the NSC. President Reagan was advised by the Intelligence Oversight Board in September 1985 that the Boland Amendment did not apply to the NSC. J.A. 1125-26 ("J.A." refers to the joint appendix in the court of appeals); *Report of the President's Special Review Board* at III-22 (1987) (*"Tower Report"*).

Robert C. McFarlane had been the National Security Advisor from before October 1984 until December 1985, during the period when the Boland Amendment's limitation on assistance to the Contras was most stringent. J.A. 1208-09, 1213-15, 1219-21. At that time, Lieutenant Colonel Oliver L. North, the member of the NSC staff responsible for monitoring developments in Nicaragua and maintaining contacts with the Contras, consulted with the Contras on military matters and assisted them in raising funds from third parties. J.A. 1127-29, 1227-28. After Admiral Poindexter succeeded McFarlane as National Security Advisor in December 1985, North continued to consult with and assist the Contras. J.A. 1352-54, 1385.

3. *Arms sales to Iran.* Covert operations involving sales of military equipment to Iran originated in August and September 1985 when Israel, after consulting with McFarlane, transferred 504 TOW anti-tank missiles to Iran. J.A. 1442-43, 1469-72, 1620-21. Shortly thereafter, Reverend Benjamin Weir, an American hostage in Lebanon, was released by his captors. *Tower Report* at III-8. In view of the apparent success of this Israeli initiative, McFarlane and North arranged for the CIA to assist Israel in making an additional transfer of 18 HAWK

anti-aircraft missiles to Iran in November 1985. J.A. 1473-81.

A few days later, the CIA prepared and President Reagan signed a Finding retroactively granting authorization to the CIA to assist Israel in transferring the missiles; that December 1985 presidential Finding described the transfer as an exchange of arms for hostages. J.A. 1489-98. In January 1986 President Reagan signed two additional Findings prospectively approving the United States' covert participation in the sale of military equipment to Iran; those Findings omitted any reference to hostages. J.A. 1499-1500, 1508, 2368, 2608. Pursuant to those Findings North and others proceeded to negotiate and arrange for the sale of approximately 1500 additional missiles to Iran. J.A. 1509-14. Two more American hostages in Lebanon were released following those sales. J.A. 1110.

4. *The Iran-Contra Affair.* In November 1986 a Lebanese newspaper reported that the United States had secretly sold weapons to Iran. *Tower Report* at III-19. Admiral Poindexter then met privately with members of two congressional intelligence committees to brief them on the sales. *Id.* at IV-13. Shortly thereafter, it was disclosed that North had caused proceeds from the arms sales to be remitted to the Contras. *See* J.A. 1440-41, 1444-56. This led to a political firestorm over what came to be known as the "Iran-Contra Affair," and in December 1986 Poindexter resigned as National Security Advisor. An Independent Counsel ("IC") was appointed to investigate the possibility of criminal wrongdoing. *See* J.A. 240 n.3; *United States v. Poindexter*, 698 F. Supp. 300, 303 n.3 (D.D.C.), *mandamus denied*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989).

Congress also conducted its own parallel investigation. The IC vigorously urged Congress not to grant immunity to witnesses, warning that "use and derivative use immunity would create serious—and perhaps insurmountable—barriers to the prosecution of the immunized wit-

ness" and that in many cases immunity "*will effectively preclude a future prosecution of the witness for the matters to which his/her testimony related.*" Memorandum of the Independent Counsel Concerning Use Immunity 1, 6 (Jan. 13, 1987) (emphasis in original); *see also United States v. North*, 910 F.2d 843, 863 ("*North I*"), *modified*, 920 F.2d 940 (D.C. Cir. 1990) ("*North II*"), *cert. denied*, 111 S. Ct. 2235 (1991). Nonetheless Congress, determining that its oversight responsibilities outweighed the IC's prosecutorial concerns, sought and obtained an order compelling Admiral Poindexter to testify pursuant to a grant of immunity under 18 U.S.C. § 6002. *See* J.A. 241-42; *Poindexter*, 698 F. Supp. at 303-04. Poindexter's public testimony, which commenced on July 15, 1987, was broadcast live on national television and radio and received extensive coverage in the press. *Id.*; J.A. 1032.

5. *Grand Jury proceedings.* The IC procured a five-count indictment against Admiral Poindexter. The indictment did not allege that the covert operations involving Iran and the Contras were unlawful; instead, its principal thrust was that Poindexter had misled Congress about those operations during his tenure as National Security Advisor. He was charged with two counts of obstructing Congress in violation of 18 U.S.C. § 1505, two counts of lying to Congress in violation of 18 U.S.C. § 1001, and one count of conspiracy to commit such offenses in violation of 18 U.S.C. § 371. J.A. 186-219. Poindexter moved to dismiss this indictment on the ground that the grand jury had heard from witnesses whose own testimony was tainted by their exposure to his immunized testimony. The district court denied the motion: even the facts that "many grand jury . . . witnesses were thoroughly soaked in . . . immunized testimony," *North I*, 910 F.2d at 863, and that Poindexter may have been "placed in a substantially worse position by the possible refreshment of a witness' memory through such exposure," J.A. 266; *Poindexter*, 698 F. Supp. at 314, gave the court "no concern." *Id. See also* Pet. App. D at 148a, 151a (reconfirming this ruling as "law of the case").

6. *The charges of obstructing Congress.* Only counts 2 and 3 of the indictment, charging Admiral Poindexter with obstructing Congress in violation of 18 U.S.C. § 1505, are of immediate concern here. Count 2 alleged two obstructive acts during July and August 1986 relating to congressional consideration of House Resolution ("H. Res.") 485, 99th Cong., 2d Sess., a proposed resolution of inquiry into the "activities of Lieutenant Colonel Oliver North or any other member of the staff of the National Security Council in support of the Nicaraguan resistance." J.A. 2387. Count 3 alleged three obstructive acts during November 1986 relating to the congressional investigation into the transfer of HAWK missiles to Iran.

The first obstructive act alleged in count 2 concerned Admiral Poindexter's written responses to requests from two House committees for comment on H. Res. 485. Poindexter's predecessor, McFarlane, had responded to a similar request one year earlier by advising Congress both that the NSC staff, including North, was acting within the spirit and letter of the law (the Boland Amendment) and, falsely, that North was not engaged in giving advice to or soliciting funds for the Contras. J.A. 2326-29, 2330-32, 2341-49. In 1986 Poindexter sought to deflect renewed inquiry by redirecting the House committees to the portion of McFarlane's statement that related to the Boland Amendment:

> I understand that information on the specific issues raised in H. Res. 485, was provided to your Committee and that this information made it clear that the actions of the National Security Council staff were in compliance with both the spirit and letter of the law regarding support of the Nicaraguan resistance.

J.A. 209-10. The indictment alleged that this response was "false, fictitious, fraudulent and misleading" and as such constituted an obstruction of Congress in violation of 18 U.S.C. § 1505. J.A. 210.

One of the House committees, not satisfied with Admiral Poindexter's response, requested an opportunity to

meet directly with North. Poindexter honored this request by arranging a meeting; at that meeting North, without Poindexter directing him or knowing that he would do so, falsely denied giving military advice to the Contras. J.A. 211. The indictment alleged that Poindexter's role in arranging the meeting constituted a second obstructive act. J.A. 212.

The three obstructive acts alleged by count 3 were (1) that Admiral Poindexter participated in the preparation of a false and misleading chronology (which, however, was never submitted to Congress) regarding the November 1985 transfer of missiles to Iran; (2) that he made "false, fictitious, fraudulent and misleading" statements to members of Congress concerning that transfer; and (3) that upon leaving his position as National Security Advisor he deleted from the memory of his office computer thousands of electronic mail messages (which, however, were retained in the NSC's central computer system). J.A. 213-15, 1696-1700, 1918.

7. *Pretrial proceedings.* As it was required to do by *Kastigar v. United States*, 406 U.S. 441 (1972), the district court undertook to consider whether and to what extent prospective witnesses, all of whom had been exposed to Admiral Poindexter's immunized testimony, would be permitted to testify at trial. But of the 25 witnesses who ultimately testified, only three (North, Karna Small, and Ronald Sable) were required to appear at the pre-trial *Kastigar* hearing (two other witnesses also appeared at the hearing but were not called at trial). *See* Pet. App. D at 159a-161a. As to all other trial witnesses the court conducted, at most, only an "in-chambers review . . . [that] neatly avoided any cross-examination of witnesses who were admittedly exposed to the immunized testimony." *North II*, 920 F.2d at 944. Although the IC offered "canned" statements (statements given in advance of Poindexter's immunized testimony) from only nine of the remaining 22 trial witnesses, and advised the court *ex parte* both that the trial testimony of three of those nine would go beyond matters contained in their

canned statements, J.A. 2627, 2653, 2657 (sealed), and that the testimony of the other six might do so, J.A. 2618 (sealed), the court was content to permit all such witnesses to testify at trial based solely upon its review of the papers that the IC had submitted *ex parte*. Pet. App. D at 158a-159a.

The pre-trial *Kastigar* hearing was principally devoted to the examination of Colonel North, who was slated to be "the most important government witness at trial." *Id.* at 163a. North testified that he had been "thoroughly immersed" in Admiral Poindexter's immunized testimony:

> I watched it on television as it happened. . . .
>
> I reviewed what was written in the papers, and the clippings that we had. I, of course, watched it on the newscasts as it was being given; and reviewed it with counsel in preparation for what we anticipated eventually happening.
>
> Then we went through that entire process again as I prepared for my trial, so that we would be able to introduce evidence that we believed would be helpful to my defense.

J.A. 949. North had "spent literally days with [Poindexter's] testimony as it happened, and then afterwards, and then again in preparation for [his] trial." J.A. 957; *see also, e.g.*, J.A. 750, 895. As a result, North testified, his "personal knowledge and recollection today is based on not just . . . living through those events, but it is also based on . . . Admiral Poindexter's own testimony." J.A. 738.

In response to repeated questioning from the IC, North declared that "I cannot tell you here today—nor could I have told you in my trial—that what I said was not the product of both having lived through it and having refreshed myself and having studied [the immunized testimony] very carefully." J.A. 759. He frequently prefaced his responses to questions with a disclaimer to the effect that he could not "certify to you what I am about to say has not been affected by Admiral Poindexter's testimony." J.A. 815; *see also, e.g.*, J.A. 746, 832,

956, 962. According to North, the only untainted testimony he could give "would be to repeat verbatim what I said before the congressional hearings, because that was prior to [Poindexter's] immunized testimony." J.A. 752; *see also* J.A. 958.

North was closely questioned concerning, *inter alia*, the December 1985 presidential Finding. In his own immunized testimony before Congress, North had stated that he could not specifically recall ever seeing the Finding but that he might have seen it in December 1985; he did not intimate that it was later destroyed. Joint Hearings before the House Select Committee to Investigate Covert Arms Transactions with Iran and the Senate Select Committee on Secret Military Assistance to Iran and the Nicaraguan Opposition, *Testimony of Oliver L. North*, 100th Cong., 1st Sess., pp. 33-34 (1987). However, Admiral Poindexter in his subsequent testimony before Congress stated that he had torn up the Finding in November 1986, possibly in North's presence, because he thought it could be "a significant political embarrassment to the President." *Poindexter Testimony* at 18-23. North thereafter testified in his own trial that he had seen Poindexter tear up the Finding. Transcript of Trial of Oliver L. North, Crim. No. 88-0080 (D.D.C. 1989) at 7612-13. Then, at the *Kastigar* hearing in this case, North explained that he had seen Poindexter tear up a paper and was "speculating," on the basis of Poindexter's immunized testimony, that it had been the Finding. J.A. 904. North could not say for certain what the document was without the aid of Poindexter's testimony. J.A. 967. "[I]t could have been any sheet of paper, but for the fact that [Poindexter] confirmed it [was the Finding]." J.A. 969. "I don't know for a fact, except that what Admiral Poindexter testified to, that the document that was destroyed that morning, or afternoon, or whenever it was, was indeed the Finding." J.A. 1015-16.[1]

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[1] North's testimony on this point was consistent with that of Commander Paul Thompson, the only other eyewitness to the Find-

Although the district court initially was "skeptical" regarding North's claim "that he could not separate his own experiences during the events at issue from what he had heard and read about them in Poindexter's immunized testimony," Pet. App. D at 163a-164a, it decided, "[a]fter considerable reflection, . . . that it will accept the North assertion, and on that basis hold him to be so tainted by his exposure to the Poindexter testimony that his own independent knowledge of the events cannot carry the day." *Id.* at 165a. The court ruled that North would be permitted to testify only (1) to matters covered by his own immunized testimony to Congress, which he gave before hearing Poindexter testify, and (2) to matters not covered by Poindexter's testimony. *Id.* at 166a. The IC immediately moved for modification of this ruling, contending that the government was entitled to North's testimony even though "his present recollection may be affected by defendant's immunized testimony." J.A. 1083; *see also* Pet. App. A at 8a-9a. In response, the court effectively countermanded its earlier ruling and held that "any of North's testimony that either elaborated upon or contradicted Poindexter's testimony could not, 'by definition,' be tainted and thus was admissible." *Id.* at 11a, quoting J.A. 1095-96 (Opinion of Jan. 4, 1990).

The parties then sought further clarification with specific reference to North's testimony concerning destruc-

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ing's destruction. Thompson told congressional investigators that Poindexter casually tore up the Finding in a manner that concealed the significance of what he was doing:

> [Poindexter] was sitting off to my left, and he would just kind of look at [documents taken from a file] and drop them or leave them on his lap. One document we came to he ripped up, not as a major action, but merely as he came to it. He ripped it up saying, "This is no longer necessary." Or, "This has no future." That document turns out to have been the finding of the fall of 1985.

Report of the Congressional Committees Investigating the Iran-Contra Affair, H.R. Rep. No. 433, 100th Cong., 1st Sess., App. B: Vol. 26, p. 1067 (1987). Thompson, like North, knew it was the Finding only because he "heard [Poindexter] say it on television." *Id.* at 1068.

tion of the presidential Finding. The IC urged that inability to elicit this "critical evidence," J.A. 1084, would "cut the heart out of the Government's case." J.A. 1176. In an order issued only minutes before commencement of opening statements to the jury, the court ruled that the IC would be permitted to present that testimony. The court reconfirmed that, "as a general proposition," it accepted North's assertion that he "could not distinguish between his own observations and the version of events described in [Admiral Poindexter's immunized] testimony." Pet. App. C at 133a. But the court believed that, with respect to "the particular issue under consideration here," *i.e.*, the destruction of the Finding, North's testimony at his earlier trial was sufficient to establish independent knowledge. *Id.*; *see also* Pet. App. B at 83a-84a n.40.

8. *Trial.* At trial, the IC was permitted to question North and other witnesses with little or no restriction as to subject matter. The district court's *Kastigar* instructions—which North, at least, had testified he could not follow, J.A. 737-39—did not warn witnesses against the use of immunized testimony to refresh recollection, focus their thinking, shape their own testimony, or alter earlier statements or understandings. *See, e.g.*, J.A. 1200. The IC was permitted repeatedly to use North's testimony from his own earlier trial—testimony that derived from North's painstaking study and careful adaptation of Admiral Poindexter's immunized testimony, *e.g.*, J.A. 949—to formulate leading questions and to refresh or impeach. *E.g.*, J.A. 1230-43, 1258-60, 1371-77, 1396-1416, 1430-34, 1451-52, 1526-29, 1547-80, 1595-1607, 1610-12.

Much of the IC's case at trial revolved around the existence and destruction of the December 1985 presidential Finding. The IC linked the destruction of the Finding to every charge in the indictment, telling the jury that "when John Poindexter destroyed that Finding that may be the most significant act you have to establish beyond any doubt in your mind that John Poindexter was intending to obstruct Congress, that John

Poindexter intended to participate in a conspiracy to obstruct Congress, and that John Poindexter in fact is guilty of those charges." J.A. 2072; *see also* J.A. 2068, 2090, 2092.

North's testimony furnished the principal proof of this "most significant act." That testimony resulted from the court's refusal to permit North to follow its own *Kastigar* instruction:

> Q. And you are certain, as you sit here before this jury, you know, do you not, that Finding you saw John Poindexter destroy, it was the Finding, the one signed by the President that had the politically embarrassing language in it, you know that, do you not?
> A. I need help here.
> The Court: Yes.
> The Witness: I am trying to remember your specific instruction to me as we started this, Your Honor, several days ago about certain aspects of other people's testimony.
> The Court: Oh. Well, you better not go into other people's testimony. Just from what you know of your own knowledge. You were there.
> A. Yes. I was.
> Q. In your own trial did you testify very definitely what you saw him destroy was the one with the politically embarrassing language?
> A. I did not have that same instruction in my trial, counsel.
> Mr. Webb: Your Honor, there has been a pretrial ruling on this matter.
> The Court: In a pretrial ruling I have ruled that your testimony at your trial where you said you were present and saw him tear it up is the credible testimony, the only credible testimony you are giving on this subject and I want you to follow that up.

J.A. 1602-03. North thus was forced to testify that Admiral Poindexter had destroyed the Finding, notwithstanding North's repeated protests that he had not known that fact apart from Poindexter's own immunized testimony.

The only other evidence of the Finding's destruction was provided by Representative Lee H. Hamilton, who chaired the House Committee before which Admiral Poindexter had given his immunized testimony. Hamilton was permitted to testify that he had heard Poindexter admit destroying the Finding, J.A. 1801-02—an admission indisputably made only during Poindexter's immunized testimony.

With respect to the two counts alleging obstruction of Congress, the IC, presumably relying upon the general rule that allegations pled in the conjunctive need be proved only in the alternative, *see Turner v. United States*, 396 U.S. 398, 420 (1970), contended that conviction could rest upon proof that Admiral Poindexter's statements to Congress were either false *or* misleading. Def. S.A. 9 ("Def. S.A." refers to the defendant's supplemental appendix in the court of appeals). The district court obliged by instructing the jury "that the corrupt furnishing of false *or* misleading statements constitutes an obstruction of Congress." J.A. 2186 (emphasis added).

Admiral Poindexter was convicted on all five counts and sentenced to concurrent terms of six months' imprisonment.

9. *Appeal.* The court of appeals reversed on two grounds:

> We reverse as to all counts because the [IC] has not carried his burden of showing that Poindexter's compelled testimony was not used against him at trial in violation of 18 U.S.C. § 6002 and the Fifth Amendment of the Constitution. We also reverse as to the two counts for violating 18 U.S.C. § 1505, on the grounds that the statute as written cannot constitutionally be applied to some of the conduct, specifically lying to or misleading the Congress, with which Poindexter is charged in those counts.

Pet. App. A at 2a. The court found it unnecessary to address other issues raised on appeal involving improper

jury instructions, insufficiency of the evidence, inadequacy of the procedures followed in inquiring into impermissible taint, and improper nonevidentiary use of immunized testimony.

a. *Use of immunized testimony.* The court began by recalling its earlier holding in *North* that section 6002 precludes "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *North I*, 910 F.2d at 860. *See* Pet. App. A at 8a. The court noted that the district court here applied a much narrower conception of "use" by accepting, for example, the IC's contention "that immunized testimony is not 'used' if it serves only to refresh a witness's recollection or if it merely influences his testimony." *Id.* at 8a-9a. Because the district court had applied the wrong legal standard, the court of appeals saw no reason "to defer to its ultimate factual finding on this issue." *Id.* at 11a.

The court concluded, moreover, that there was no need to "remand for new findings under the *North* standard . . . because the record plainly demonstrates that the IC has neither met his burden of proof nor indicated that there might be any additional evidence that he could put forward in order to meet that burden." *Id.* The court elaborated:

> Because the trial court applied its narrower standard for "use," it never made a finding that North's recollection (either at the time of his own trial or later at Poindexter's trial) was not refreshed or otherwise "shaped, altered, or affected" by his exposure to Poindexter's immunized testimony. And in view of North's immersion in that testimony (the effects of which he does not claim to be able to segregate), it would be clearly erroneous to hold that the IC met his "heavy burden," *Kastigar*, 406 U.S. at 461, of demonstrating that North's testimony was *not* influenced by Poindexter's immunized statements to the Congress.

Id. at 14a (emphasis in original). The court noted that, indeed, the IC had failed "to make any argument [or] offer any evidence tending to show that North's testimony was not influenced by his exposure." *Id.* at 16a.

In addition, as it had done in *North*, the court ruled that "unless the IC proves on remand that the evidence received by the grand jury was untainted, or that any taint was harmless beyond a reasonable doubt, the indictment must be dismissed." *Id.* at 18a.

Chief Judge Mikva agreed that the district court had applied the wrong legal standard but dissented from the majority's refusal to remand for new findings on the use of immunized testimony at trial; in his view, the record did not foreclose the possibility that the district court might conclude "after a full hearing applying the appropriate standard, that the prosecution has satisfied its burden." *Id.* at 47a.

b. *Obstruction of Congress.* The court of appeals then considered those portions of counts 2 and 3 that charged Admiral Poindexter with violating section 1505 by "lying to or misleading the Congress." *Id.* at 2a. The court's inquiry was narrowly focused; it expressly did "not rule upon any issues specific to Counts 2 and 3 other than the sufficiency of the allegations regarding false and misleading statements." *Id.* at 19a.

Section 1505 itself does not refer to the making of false or misleading statements; it punishes "[w]hoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede . . . the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any committee of either House." The court questioned whether the word "corruptly" has a sufficiently definite meaning, as applied to the making of false or misleading statements, to be the basis of a criminal conviction. *Id.* The court noted that, "on its face, the word 'corruptly' is vague." *Id.* at 20a. After a careful review, the court

determined that "the legislative history gives no better notice than does the statutory text that lying to or misleading a Member of Congress (or an agency) violates § 1505." *Id.* at 34a. Finding no prior decision extending section 1505 to reach statements alleged only to be false or misleading, *id.* at 34a-38a, the court concluded that the statute "is too vague to provide constitutionally adequate notice that it prohibits," and in fact does "not cover the conduct at issue on this appeal—making false and misleading statements to Congress." *Id.* at 22a, 39a.

Chief Judge Mikva concurred in this holding as to count 2 but not as to count 3. He explained:

> [T]here is a clear distinction between politically misleading (but literally true) advocacy and outright lying. No matter how devious the intent, a mere act of lobbying or otherwise seeking to persuade an official cannot fall under the definition of "corruptly" in the context of section 1505 . . . .

Id. at 52a. Judge Mikva concluded that application of section 1505 to count 2's allegations of mere "political positioning" would "stretch the statutory terms beyond constitutional limits." *Id.* at 52a-53a. But he believed that conviction on count 3 could be upheld (assuming the district court were permitted on remand to find that immunized testimony was not used at trial) because, in his view, Admiral Poindexter "*lied* to Congress about the existence of the first Presidential finding and then later destroyed it." *Id.* at 52a (emphasis in original). (This reveals some confusion about the scope of count 3: that count does not mention either the existence or the destruction of the presidential Finding, *see* J.A. 213-15; and the indictment called for conviction on that count, as well as on count 2, even if the jury found that Poindexter's statements were only misleading and not false. J.A. 2186).

ARGUMENT

This case does not involve any of the broad and loosely phrased questions that the IC seeks to present to this Court. With respect to the use of Admiral Poindexter's immunized testimony, the court of appeals applied precisely the same standard as in *North*—a standard so plainly correct that the IC makes no direct attack upon it here. Instead, the IC attacks a purported procedural ruling that the court manifestly did not make (question presented # 2) and a purported substantive standard that the court of appeals neither endorsed nor adopted as its own (question presented # 3). These are attacks on straw men. Furthermore, the IC's underlying concern—that conscientious enforcement of section 6002 and the Fifth Amendment may complicate or frustrate prosecution of persons compelled to give public immunized testimony, *see* Pet. 9, 21, 29—is no different from the concern the IC expressed *before* Poindexter testified. *See North I*, 920 F.2d at 863. The opinion below merely reconfirms the statutory and constitutional safeguards that appropriately attach when testimony is compelled.

With respect to the proper scope of section 1505, the IC both misstates and overstates the court's holding. The court did not hold globally that the statute is unconstitutionally vague (question presented #1). The court held only that the statute does not apply, and cannot constitutionally be applied, to an allegation of "lying to or misleading the Congress." App. A at 2a. This narrow ruling is solidly grounded in the statutory text, the legislative history, and legitimate concerns of due process. Furthermore, the IC's assertions to the contrary notwithstanding, *see* Pet. 9, 14, the court's ruling leaves no troublesome gap in the criminal law. Outright lying to Congress remains punishable under 18 U.S.C. § 1001. Apart from an advocate's use of literal truth to mislead, all other purportedly obstructive conduct of the kind hypothesized by the IC—specifically including the other allegations in

counts 2 and 3 here, *see* Pet. App. A at 19a—remain punishable under section 1505 itself. Consequently, the sole effect of the court's decision is to clarify that it is not a felony to make arguably misleading but truthful statements to Congress.

There is no conflict among the circuits on any of these issues. The decision below, which is rooted in the peculiar facts of a singularly unusual case, is correct and warrants no further review.

I. THE USE OF ADMIRAL POINDEXTER'S IMMUNIZED TESTIMONY.

The underlying question confronting the court of appeals was whether North's testimony—testimony whose content reflected North's thorough and purposeful study of Admiral Poindexter's immunized testimony—was "directly or indirectly derived from such [immunized] testimony" within the meaning of section 6002. The answer to that question was clear. The court already had held that section 6002 bars "the use of immunized testimony by witnesses to refresh their memories, or otherwise to focus their thoughts, organize their testimony, or alter their prior or contemporaneous statements." *North I*, 910 F.2d at 860. North's testimony in this case was the paradigmatic example of such improper use of immunized testimony.

1. The IC understandably does not directly challenge *North*'s holding that "[w]hen the government puts on witnesses who refresh, supplement, or modify th[eir] evidence with compelled testimony, the government *uses* that testimony to indict and convict" within the meaning of section 6002. *North I*, 910 F.2d at 860 (emphasis added). That holding flows directly from this Court's determination that the statute "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect." *Kastigar*, 406 U.S. at 453 (emphasis in original). Not surprisingly, the IC is unable to point to

any case contrary to the decisions here and in *North*; the petition cites no case holding that a prosecution witness may be refreshed with immunized testimony.

Invoking "attenuation notions," however, the IC argues that "exposure of a witness to immunized disclosures that happen either to refresh his recollection or to shape his testimony in some subliminal way, especially when not the product of prosecutorial contrivance, is too remote a 'use' to require exclusion of the witness's evidence." Pet. 28. But that carefully couched contention is far removed from the facts of this case. North's exposure did not just "happen" to refresh his recollection or shape his testimony in "some subliminal way"; there was, moreover, ample "prosecutorial contrivance." Congress caused the public dissemination of Admiral Poindexter's immunized testimony, which Poindexter had wanted to give in closed session. *Poindexter Testimony* at 1-10. North and his counsel then exploited this public dissemination by carefully studying each line of immunized text for the specific purpose of crafting the story North could tell at his own trial. North's use of Poindexter's testimony in that trial was conscious, deliberate, and pervasive. The IC then took North's testimony from that trial, knowing it to be the product of his intensive and purposeful exposure, and, with the district court's energetic assistance, contrived to force North to repeat that tainted testimony in this case. *See* pages 7-8, 10-11, *supra*. The court of appeals had noted in *North*—in circumstances considerably less abusive than those here—that "it is hard to imagine a more *direct* use of immunized testimony than in such a situation, and therefore . . . the phrase 'attenuated use' seems quite inappropriate." *North II*, 920 F.2d at 947 (emphasis in original). This case follows *a fortiori*. And nothing in the series of inapposite cases cited by the IC, *see* Pet. 27-28, is at all to the contrary.

The IC further speculates, apparently as a suggested limitation on *North*, that "details of a witness's testimony that differ from or add to the immunized disclosures seemingly could not have been influenced by those dis-

closures." Pet. 27; *see also id.* at 24. But it takes only a modicum of common sense to realize that a witness' recollection may be different from the defendant's, or his testimony more expansive, and yet still be the product of exposure; for example, absent exposure the witness might have remembered, understood, or appreciated the events in a very different way, if indeed at all. *See, e.g., North I*, 910 F.2d at 862. In short, "[t]hat a witness proffers a more detailed account than, or rebuttal of, the defendant's immunized testimony . . . simply does not rule out the possibility that the witness's memory was refreshed or influenced by the immunized testimony." Pet. App. A at 11a.

2. The IC's principal contention here is not that *North* was wrongly decided but that the decision below "goes far beyond the earlier ruling in *North*." Pet. 9. The IC claims the decision stands for the rule that " 'the government must demonstrate affirmatively that the immunized testimony did not . . . [have] an influence on [the trial witnesses'] thinking, even one for which they cannot at this time consciously account.' " *Id.* at 26a, quoting Pet. App. A at 10a. (The IC is so fond of this quotation that it is made the foundation of question presented #3 and is repeated twice verbatim. *See id.* at i, 8-9, 26.) But as the IC surely knows, the quoted passage derives from the *district court's* opinion and constitutes only that court's belittling caricature of the argument of trial counsel. *See* Pet. App. D at 144a, quoted at Pet. App. A at 10a. The court of appeals, while holding that the district court itself applied the wrong standard, did not endorse or adopt that caricature as its own position. The court did nothing more than apply its earlier decision in *North* to the peculiar facts of this case.

The IC nonetheless asserts that in this case, unlike *North*, the court of appeals "was unable to point to any concrete reason to believe that witnesses had been affected by the immunized disclosures." Pet. 26. That is simply false. North gave unrebutted testimony that his recollection of numerous specific events was directly influenced

or enhanced by his probing study of Admiral Poindexter's immunized testimony, *see* pages 7-8, *supra*, and the court of appeals was well aware of that. *See* Pet. App. A at 12a. This is not a case involving only a mere inarticulable suspicion of taint. Indeed, if ever there was a witness affected by immunized disclosures, North was that witness. Furthermore, Representative Hamilton's testimony concerning the destruction of the Finding, J.A. 1801-02, indisputably was based upon Poindexter's immunized testimony.

3. The IC contends that the court of appeals imposed "a procedural requirement of unparalleled strictness: it effectively held that a witness whose trial testimony was not 'canned' and who was exposed to immunized disclosures will not be permitted to take the stand at trial unless he 'persuasively claim[s] that he can segregate the effects of his exposure.'" Pet. 21. *See also id.* at i (question presented #2). There was no such holding.

To begin with, the IC does have "canned" testimony from North, in the form of the immunized testimony that he gave before Congress. Under the holding below, the IC remains free to use that testimony. But the IC apparently has no use for such untainted testimony. Therein lies the problem. After North was exposed to Admiral Poindexter's immunized testimony he testified at his own trial and, in doing so, deviated from and expanded upon his earlier "canned" testimony in material ways; it is that later, post-exposure testimony that the IC insisted upon using against Poindexter, even though North repeatedly swore that it was the direct product of his thorough immersion in Poindexter's immunized testimony.

In rejecting the IC's position, the court of appeals imposed no "procedural requirement." It simply stated that "where a substantially exposed witness does not persuasively claim that he can segregate the effects of his exposure, the prosecution does not meet its burden merely by pointing to other statements of the same witness that were not themselves shown to be untainted." Pet. App.

A at 16a. In other words, the IC had not disproved taint merely by pointing to the testimony that North was able to give at his own trial *after* his exposure to the immunized testimony. It truly is "difficult to quarrel," Pet. 22, with that result.

The IC nonetheless reads this unexceptional holding as precluding the prosecution from carrying its burden by presenting "circumstantial indicia that the witness had not been affected by the immunized testimony." Pet. 22; *see also id.* at 24. It does nothing of the kind. The court in *North* explicitly disavowed the suggestion "that the prosecutor was barred from trying to show in any fashion that a witness' testimony was not influenced by the immunized testimony," *North II*, 920 F.2d at 943, and in this case the court expressly "decline[d] to adopt the [similar] suggestion of amicus American Civil Liberties Union." Pet. App. A at 16a. Instead, the court held only that the IC had failed here to adduce any probative "circumstantial indicia" and noted that, indeed, the "IC has not suggested any other way in which he might meet his burden if we were to remand." *Id.*

4. At bottom, the IC's argument is predicated upon the oft-repeated but wholly fictitious claim that the district court found "North lied when he denied having an untainted memory." Pet. 23; *see also, e.g., id.* at 6-7, 8, 22, 27 n.19. There was no such finding. The district court did find—and this was the narrow and only matter encompassed by the district court's "credibility determination," Pet. 23—that North lied when he denied having *any independent knowledge* of the destruction of the December 1985 presidential Finding. Pet. App. C at 133a; Pet. App. B at 83a. As the court of appeals correctly noted, however, the district court "*never* made a finding that North's *recollection* (either at the time of his own trial or later at Poindexter's trial) was not refreshed or otherwise 'shaped, altered, or affected' by his exposure to Poindexter's immunized testimony." Pet. App. A at 14a (emphasis added).

The district court actually found that North was *not* the witness hypothesized in question presented #3 as having "a present, independent recollection of events." Pet. i. Immediately following the pretrial *Kastigar* hearing, the court observed that North's sworn statement that his recollection of events had been pervasively influenced by "what he had heard and read about them in Poindexter's immunized testimony," Pet. App. D at 163a-164a, "stands . . . unrefuted." *Id.* at 165a. The court stated that it "could decline to credit that testimony only if it were to reject North's assertions as entirely unbelievable," *id.*, and it refused to do that. Instead, the court deliberately ruled that "it will accept the North assertion." *Id.* Although the court had doubts about North's veracity both then and later, *see* Pet. App. C at 133a; Pet. App. B at 83a, the court steadfastly adhered to that ruling. Thus, even after trial the court reconfirmed that it "accept[ed] as a general proposition North's assertion of an inability to distinguish between his own conversations [*sic*] and the version of events described in defendant's immunized testimony." Pet. App. B at 83a-84a n.40. The court simply permitted North to testify against Poindexter notwithstanding. *See* J.A. 1095-96 (Opinion of Jan. 4, 1990); *compare* J.A. 946-1021 (North's pretrial testimony) *with* J.A. 1200-1672 (North's trial testimony). That was the error that the court of appeals quite properly corrected.[2]

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[2] In view of its disposition of the case, the court of appeals had no occasion to consider whether the trial court's finding concerning North's purported independent knowledge of the destruction of the presidential Finding was clearly erroneous, which it most certainly was. In his own immunized testimony before Congress, North had stated that he could not specifically recall ever seeing the presidential Finding; when North then heard Admiral Poindexter's immunized testimony, he realized that he had been present when Poindexter tore up the Finding; liberally borrowing from Poindexter's immunized description of what he had done and why he had done it, North then wove that newly acquired knowledge into his testimony at his own trial, without ever expressly affirming that he had actually known at the time that Poindexter was tearing up the

5. The IC complains that the appellate court's conscientious enforcement of section 6002 and vigilant safeguarding of the constitutional privilege against self-incrimination "will make almost impossible the prosecution of any case involving public immunized statements that requires testimony by persons sympathetic to the

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Finding. *See* page 8, *supra*; *compare Poindexter Testimony* at 18-23 *with* Pet. 25 n.18.

The district court gave no credible reason for rejecting North's account. Indeed, the court initially accepted it. Pet. App. D at 165a-166a. Then, when informed that inability to prove that Poindexter had destroyed the Finding would "cut the heart out of the Government's case," J.A. 1176, the court reversed itself and found North to be lying about his lack of independent knowledge. Pet. App. C at 131a-135a. But the reasons given by the court in support of that finding were insubstantial.

The court reasoned first that North's "own trial testimony" constituted compelling evidence of independent knowledge. *Id.* at 133a. But North's trial testimony was given *after* exposure and thus was itself presumptively tainted; North had explained that the testimony in fact was tainted; and the court, which had not observed North at his own trial, was in no position to compare or comment upon the credibility of North's testimony on that occasion. As its second rationale, the court hypothesized, with absolutely no evidentiary basis for doing so, that as witness to the "ceremonial destruction of a state paper" North must have known and remembered what he had seen. *Id.* at 134a; *see also* Pet. App. B at 84a. The court was indulging in a fanciful and melodramatic reconstruction of what had appeared to eyewitnesses as the prosaic and off-hand disposal of a superseded draft. *See* pages 8-9 n.1, *supra*. It was only after the trial—and some six months after the pretrial *Kastigar* hearing—that the district court offered "North's demeanor at the *Kastigar* hearing" as a third reason for rejecting his account. Pet. App. B at 85a. A reviewing court necessarily must be deeply skeptical when a court, after first accepting testimony and then rejecting it on insubstantial nondemeanor grounds, attempts long after the fact, and as an obvious afterthought, to justify its decision by reference to the witness' demeanor—especially where, as here, the witness' account was facially plausible, internally consistent, and supported by that of the only other eyewitness. Moreover, the court never gave a reason, and there is none, for believing that North deliberately lied when he claimed, during the course of his own immunized testimony, that he could not specifically recall ever seeing the Finding.

accused." Pet. 22. Of course, the taking of compelled testimony is not intended to be cost-free to the government; the decision below, however, works no change in the fundamental calculus. Indeed, the IC had warned Congress, in terms just as apocalyptic as those now used in the petition, that a grant of immunity to Admiral Poindexter could create "insurmountable" barriers to successful prosecution. *North I*, 910 F.2d at 863. In the face of this warning, Congress deliberately granted immunity and caused widespread dissemination of the immunized testimony, knowing that in doing so it was "taking a great chance that the witness cannot constitutionally be indicted or prosecuted." *Id.* at 862.

In any event, the IC exaggerates both the problem a prosecutor faces and the practical significance of that problem. Prosecution is hardly "impossible." At the very minimum, a prosecutor can use testimony taken from witnesses in advance of their exposure—like the "canned" testimony taken from North and other witnesses here—and also may question exposed witnesses about subjects not covered in the immunized testimony. Furthermore, cases like this and *North* are truly *sui generis*. It will be a rare case indeed where immunized disclosures receive such widespread publicity and are so closely studied for the very purpose of developing testimony to be given before a grand jury or at trial. And this case must be literally unique in the government's selection as its key witness one so thoroughly and purposefully immersed in immunized testimony as North. Conscientious enforcement of section 6002 in cases like this poses no seriously recurrent problem for prosecutors.

6. It should be recalled, finally, that the court of appeals has directed the IC to show on remand that immunized testimony was not used before the grand jury, Pet. App. A at 17a-18a, and the IC has acquiesced in that ruling. *See* Pet. 8 n.4. As a practical matter, that means this case is over. Confronted with an identical ruling in *North*, the IC dismissed the indictment without even attempting to make the required showing. *See* Pet. App. A

at 46a. This was hardly surprising, for the facial indicia of taint were overwhelming. *See North I*, 910 F.2d at 863-64. Because the grand jury and, indeed, the original indictment were identical in both cases, the same result is sure to follow here. There is no need for this Court to render a merely advisory opinion on other issues in the meantime.

II. THE PROPER SCOPE OF SECTION 1505.

In an effort to make the decision below appear vastly more significant than it really is, the IC repetitively overstates the actual holding with respect to section 1505. Thus, the IC begins by claiming that the court of appeals held the statute "unconstitutional as applied to all cases that do not involve subornation." Pet. 10. That is manifestly incorrect. The decision holds only that the statute "cannot constitutionally be applied to some of the conduct, specifically lying to or misleading the Congress, with which Poindexter is charged." Pet. App. A at 2a. The court explicitly limited its consideration to "the sufficiency of the allegations regarding false and misleading statements" and deliberately left standing all other portions of the counts under section 1505. *Id.* at 18a-19a. This preserves, for example, the possibility of reprosecution on that portion of count 3 charging Poindexter with deleting electronic mail messages from the memory of his office computer—a charge obviously not involving subornation. *See* J.A. 215. Indeed, apart from the allegations of false or misleading statements, and notwithstanding the IC's flat assertion to the contrary, *see* Pet. 15, the decision below leaves intact the application of section 1505 to all the "[m]any common forms of obstructive behavior—such as concealing or destroying evidence, conduct [allegedly] undertaken by Poindexter in this case and charged in Count 3." *Id.* at 14.

In a series of related exaggerations, the IC claims that the decision below "leaves a large gap in the criminal law," Pet. 9, by "render[ing] nugatory a law that is of central importance," *id.* at 10, and "debilitating the

principal weapon against obstruction of Congress." *Id.* at 14. Section 1505 is hardly debilitated or rendered nugatory by a refusal to extend its coverage to arguably deceptive but literally truthful statements; no court ever has held (and, indeed, apparently no other prosecutor ever has argued) that the statute can be so broadly construed. Moreover, even if, as the IC claims, the decision below implies that allegations only of lying (rather than, as here, of lying or misleading in the alternative) also fall outside the scope of the statute—a result that would by no means be unprecedented, *see United States v. Essex*, 407 F.2d 214 (6th Cir. 1969)—such conduct still would remain subject to prosecution under 18 U.S.C. § 1001. *See* Pet. App. A at 20a, 39a-44a. The decision thus neither weakens the substantive prohibitions of the criminal law nor detracts from effective enforcement.

In the final analysis, the narrow result of the decision below is merely to confirm that administrative officials, lobbyists, and others do not commit felonies when they make misleading but literally true statements in an effort to influence Congress. That result surely is correct, and it does not warrant review by this Court.

1. The IC reads the opinion below as resting exclusively on constitutional grounds and complains that the court did not suggest "that Poindexter's conduct fell outside the plain [*sic*] terms of Section 1505." Pet. 10. That is wrong. The court noted that the statutory text "does not at all clearly encompass" the indictment's allegations, Pet. App. A at 20a, reasoned that "[o]n its face, § 1505 favors the transitive reading," *id.* at 23a, and ultimately held that the statute does "not cover the conduct at issue on this appeal." *Id.* at 39a. It was precisely because the statute on its face does not appear to cover all the indictment's allegations that the court undertook to review the legislative history and caselaw, before concluding that neither "supplies the constitutionally required notice that the statute on its face lacks." *Id.*

The decision reflects both a careful reading of the statute and its history and a proper weighing of the

demands of due process. Under counts 2 and 3 of the indictment, the IC sought, and the district court permitted, Admiral Poindexter's conviction for making literally truthful statements. Def. S.A. 9; J.A. 2186. Section 1505 does not extend that far and, as a constitutional matter, it could not.

2. Even the dissenting judge below agreed that section 1505 does not criminalize "politically misleading (but literally true) advocacy." Pet. App. A at 52a. The political advocate's artful use of literal truth in an effort to influence Congress was not intended to be, and is not, "corrupt" within the meaning of section 1505. Were it otherwise, every lobbyist in town would soon be behind bars. This common-sense reading of the statute is especially compelling in a case like this, involving communication between the two political branches. Congress cannot have intended to chill the flow of information out of the Executive Branch by making every truthful but arguably misleading statement potentially criminal.

Furthermore, if the question of statutory construction were close, which it is not, any doubt would have to "be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). "[W]hen there are two rational readings of a criminal statute, one harsher than the other, [courts] are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). Congress has not made it "clear and definite" that section 1505 applies to literally true but possibly misleading statements.

3. Nor did Congress make it "clear and definite" that section 1505 applies to false statements. That issue is not squarely presented here, for the IC sought conviction regardless of falsity. Def. S.A. 9; J.A. 2186. The court of appeals, aware of this fact, narrowly limited its holding to the IC's specific allegation of "lying to *or* misleading the Congress." Pet. App. A at 2a (emphasis added); *see also id.* at 34a. On the other hand, at other places in its opinion the court referred to the conduct at issue

simply as "lying to Congress." *E.g.*, *id.* at 19a. This choice of language appears to indicate the court's view that section 1505 cannot fairly be read to encompass even narrow allegations of lying, let alone the broader allegations of lying or misleading that the IC has made in this case.

Such a limitation on the scope of the statute would be both faithful to the statutory text, which, as the court noted, strongly suggests that the word "corruptly" is used in its transitive sense, *see id.* at 23a, and entirely consistent with the legislative history, which at no point reveals any intention of duplicating the prohibitions of section 1001. *See id.* at 24a-34a. The IC, referring to a predecessor statute, argues that "[a]s the first clause [of that statute] directly addressed endeavors to suborn or tamper with witnesses, it is hardly likely that the second clause was intended to serve . . . a similarly 'transitive' purpose," Pet. 19, but that is self-evidently incorrect: the second clause, now section 1505, principally serves the residual or "omnibus" function of prohibiting the suborning of all persons not themselves witnesses, such as congressmen, legislative staff, administrative officials, and other nonwitnesses. Such conduct is "the 'core' behavior to which the statute may constitutionally be applied." Pet. App. A at 37a. Its "application to other behavior is uncertain." *Smith v. Goguen*, 415 U.S. 566, 578 (1974).

The IC contends that the word "corruptly" is sufficiently elastic, and yet also adequately precise, to encompass the making of false statements; but the petition suggests no coherent definition of that word. Instead, the IC adopts the circular reasoning of *United States v. Mitchell*, 877 F.2d 294, 299 n.5 (4th Cir. 1989): in *Mitchell*, which did not itself involve false statements, the court reasoned that "corruptly" implies that "any attempt to improperly influence a congressional investigation is illegal." *See* Pet. 11. But it obviously will not do simply to replace one vague term ("corruptly") with another ("improperly"). *See United States v. Reeves*,

752 F.2d 995, 1001 (5th Cir. 1985). To be sure, the IC has identified cases in which section 1505 has been applied to the making of false statements. *See* Pet. 12-13 & n.10. But in none of those cases did the court expressly consider whether and then determine that the word "corruptly" is constitutionally concrete as applied to such conduct; the statute simply was applied by default. The analogous provision in section 1503 has received greater judicial attention, and at least one court has held that "[n]either the language of section 1503 nor its purpose [covers] the rendering of . . . false testimony." *Essex*, 407 F.2d at 218. *See also, e.g., United States v. Thomas*, 916 F.2d 647, 653 (11th Cir. 1990).

In any event, it would be premature in this case to address the application of section 1505 to unadorned allegations of outright lying to Congress. The indictment seeks Admiral Poindexter's conviction even for true statements, and it is solely the indictment in this case that is at issue here. No case cited by the IC upholds a conviction under section 1505 for making misleading but literally true statements or, indeed, comes even remotely close. For example, in *United States v. Alo*, 439 F.2d 751, 754 (2d Cir.), *cert. denied*, 404 U.S. 850 (1971), which the IC characterizes as involving "false and evasive" statements, Pet. 12, the court said "the jury had to conclude [the defendant] was lying."

4. Application of section 1505 to true statements unquestionably would, as even the dissenting judge below observed, "stretch the statutory terms beyond constitutional limits." Pet. App. A at 52a-53a. Nothing in the word "corruptly" or in the remaining text of the statute gives the slightest hint that a political advocate's use of literal truth to mislead could be criminal. "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). A statute that made it a crime to tell the

truth "corruptly" would impermissibly "allow[] policemen, prosecutors, and jurors to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. at 575; *see also, e.g., Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Guilt or innocence in a criminal trial cannot be allowed to turn on the jury's idiosyncratic notions of political morality.

5. The IC expresses concern that the decision below may be followed in cases involving other obstruction statutes. Pet. 15 & n.13. But that would work no change in the law: the IC offers no evidence that any of those statutes ever has been applied to misleading but literally truthful statements. It is highly significant, however, that the most recent of these statutes, section 1512(b), unlike section 1505 and other forebears, proscribes tampering with testimony by "corruptly persuad[ing] another person, or attempt[ing] to do so, or *engag[ing] in misleading conduct* toward another person" (emphasis added). This reveals that when Congress wants to punish misleading statements or conduct, it knows how to do so and does so explicitly. Congress did not do so in any of the obstruction statutes other than section 1512. Moreover, even if other obstruction statutes were held, as was section 1503 in *Essex*, to have no application to outright falsehoods, the prosecution still would be armed with sections 1001 (false statements) and 1621 (perjury). There would be no troublesome gap in the law.

Finally, the IC's suggestion that numerous other statutes also may be affected by the decision below, *see* Pet. 15-16 n.14, is an obvious makeweight. Those statutes either explicitly punish perjury, proscribe various physical acts, or impose no criminal sanctions. They are untouched by the holding in this case that the word "corruptly," as used in section 1505, is not sufficient to imply a prohibition against statements that are alleged to be false or misleading.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

KEITH A. JONES
Counsel of Record
RICHARD W. BECKLER
JOSEPH T. SMALL, JR.
STEPHEN M. MCNABB
FREDERICK ROBINSON
MICHAEL G. MCGOVERN
FULBRIGHT & JAWORSKI
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 662-0200
Attorneys for Respondent